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DEPARTMENT OF ENERGY

10 CFR Part 438

RIN 1904-AB98

Petroleum Reduction and Alternative Fuel Consumption Requirements for Federal Fleets

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) today publishes a proposed rule to implement section 142 of the Energy Independence and Security Act of 2007, which amended the Energy Policy and Conservation Act and directed the Secretary of Energy to issue implementing regulations for a statutorily-required reduction in petroleum consumption and increase in alternative fuel consumption for Federal fleets.

DATES: Public comment on this proposed rule will be accepted until **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN 1904-AB98, by any of the following methods:

1. Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

2. E-mail to *EISA_142_Comments@ee.doe.gov*. Include RIN 1904-AB98 in the subject line of the e-mail. Please include the full body of your comments in the text of the message or as an attachment.

3. Mail: Address written comments to Cyrus Nasser, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Federal Energy Management Program (EE-2L), 1000 Independence Avenue, S.W., Washington, DC 20585-0121.

Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

This notice of proposed rulemaking and any comments that DOE receives will be made available on the Federal Energy Management Program's Federal Fleet Management website at http://www1.eere.energy.gov/femp/about/fleet_mgmt.html.

FOR FURTHER INFORMATION CONTACT: Cyrus Nasser, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Federal Energy Management Program (EE-2L), 1000 Independence Avenue, S.W., Washington, DC 20585-0121; *cyrus.nasser@ee.doe.gov*. For legal issues, contact: Michael Jensen, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-71, 1000 Independence Avenue, S.W., Washington, DC 20585; *michael.jensen@hq.doe.gov*.

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I. Introduction and Background

The Energy Independence and Security Act of 2007 (EISA, Pub. L. 110-140) was signed into law on December 19, 2007. Section 142 of EISA modified Part J of title III of the Energy Policy and Conservation Act (EPCA, Pub. L. 94-163) by adding a new section 400FF entitled “Federal Fleet Conservation Requirements.” Section 400FF establishes mandatory reductions in annual petroleum consumption and mandatory increases in annual alternative fuel consumption for Federal fleets and directs the Secretary of Energy (Secretary) to issue implementing regulations. The purpose of this notice is to present the U.S. Department of Energy’s (DOE) proposed regulations pursuant to this statutory directive.

New section 400FF(a)(1) provides that the Secretary shall issue regulations for Federal fleets subject to the alternative fueled vehicle (AFV) acquisition requirements of section 400AA of EPCA to require that, beginning in fiscal year (FY) 2010, Federal fleets “shall reduce petroleum consumption and increase alternative fuel consumption each year by an amount necessary to meet the goals described in paragraph (2).” Section 400FF(a)(2)

provides, pursuant to paragraph (1), not later than October 1, 2015, and for each year thereafter, Federal fleets “shall achieve at least a 20 percent reduction in annual petroleum consumption and a 10 percent increase in annual alternative fuel consumption, as calculated from the baseline established by the Secretary for [FY] 2005.” Section 400FF(a)(3) requires the regulations to include “interim numeric milestones” to assess annual progress towards accomplishing the goals described in section 400FF(a)(2) and an annual Federal fleet reporting requirement “on progress towards meeting each of the milestones and the 2015 goals.” Section 400FF(b) sets forth requirements for the development and implementation of Federal fleet plans “to meet the required petroleum reduction levels and the alternative fuel consumption increases, including the milestones specified by the Secretary.”

Section 142 of EISA addresses similar matters as the fleet provisions in Executive Order (E.O.) 13423, “Strengthening Federal Environmental, Energy, and Transportation Management,” 72 FR 3919 (Jan. 26, 2007), and E.O. 13514, “Federal Leadership in Environmental, Energy, and Economic Performance,” 74 FR 52117 (Oct. 8, 2009).

However, there are notable differences between both Executive Orders and EISA section 142. Section 2(g) of E.O. 13423 provides, in part, that if a fleet consists of at least 20 motor vehicles, the fleet must reduce its “total consumption of petroleum products by 2 percent annually through the end of [FY] 2015,” relative to a baseline of FY 2005.

Section 2(a)(iii)(C) of E.O. 13514 extends the petroleum reduction requirements set forth in E.O. 13423 through the end of FY 2020. Section 2(g) of E.O. 13423 also provides, in part, that if a fleet consists of at least 20 motor vehicles, the fleet must increase “the total

fuel consumption that is non-petroleum-based by 10 percent annually”¹ relative to its FY 2005 baseline level.

The language set forth in E.O. 13423 and E.O. 13514 regarding requirements for fleet petroleum reductions and alternative fuel increases is not identical to the language contained in EISA section 142. Regarding annual fleet alternative fuel consumption, the Council on Environmental Quality’s “Instructions for Implementing Executive Order 13423” (CEQ Instructions) provides that the requirement in E.O. 13423 to increase “the total fuel consumption that is non-petroleum-based by 10 percent annually” “is measured relative to the prior year’s alternative fuel usage levels.” The language in EISA, however, requires at least a 10 percent increase in annual alternative fuel consumption as measured relative to a FY 2005 baseline. Accordingly, pursuant to this proposed rule, for each FY after FY 2015, each Federal fleet would be required to achieve an increase in its annual alternative fuel consumption that is at least 10 percent greater than its FY 2005 alternative fuel consumption level. Regarding annual Federal fleet petroleum consumption reductions, the proposed regulations are complementary and consistent with those of E.O. 13514. DOE’s positions on these matters are discussed in detail in section III of the **SUPPLEMENTARY INFORMATION** to this proposed rule.

On May 24, 2011, the President issued a memorandum to provide guidance to Federal agencies to help achieve the Administration’s Federal fleet performance goals and to ensure that agencies are in compliance with Executive Order 13514. *See* Presidential

¹ The Council on Environmental Quality (CEQ) has issued “Instructions for Implementing Executive Order 13423” (CEQ Instructions). *See* 72 FR 33504 (June 18, 2007) (also available at <http://www.fedcenter.gov/programs/eo13423/>). Among other things, the CEQ Instructions make clear that the definition of the term “non-petroleum-based fuel” is consistent with the definition of the term “alternative fuel,” as presented in section 301 of the Energy Policy Act of 1992.

Memorandum, Federal Fleet Performance, *available at* <http://www.whitehouse.gov/the-press-office/2011/05/24/presidential-memorandum-federal-fleet-performance>. The Presidential Memorandum directs that by December 31, 2015, all new light duty vehicles leased or purchased by agencies must be alternative fueled vehicles, as that term is defined in the memorandum. The Presidential Memorandum also directs the U.S. General Services Administration (GSA) to develop a methodology to determine optimal fleet size and composition and instructs agencies to use this methodology to determine fleet inventory targets and to prepare fleet management plans to achieve these targets no later than December 31, 2015. Furthermore, the Presidential Memorandum recognizes the need to acquire advanced vehicles and to decrease Federal fleet petroleum consumption in a cost-effective manner. Regarding Federal fleet petroleum consumption reductions, the proposed regulations are complementary and consistent with the requirements set forth in the May 2011 Presidential Memorandum. As with Executive Order 13514, the Presidential Memorandum complements the statutory requirements established in section 142 of EISA and the implementing regulations proposed in this document.

Today's proposed rule would establish regulations implementing the requirements for Federal fleet reductions in petroleum and increases in alternative fuel. In addition to section 2(g) of E.O. 13423, section 2(a)(iii)(C) of E.O. 13514, and the May 2011 Presidential Memorandum, fleets also would be subject to section 303 of the Energy Policy Act of 1992 (Pub. L. 102-486), as amended by section 141 of EISA, section 400AA(a) of EPCA, as amended by section 701 of the Energy Policy Act of 2005 (Pub. L. 109-58), and sections 246 and 526 of EISA, which impose certain requirements related

to Federal fleet vehicle emissions, Federal fleet fueling centers, the procurement and acquisition of AFVs, and the use of alternative fuels by dual fueled vehicles.

II. Applicability

As specified in section 400FF of EPCA, today's proposed rule would apply to those "Federal fleets subject to section 400AA" of EPCA. 42 U.S.C. 6374e(a). However, neither section 400AA nor section 400FF of EPCA contains a definition of the term "Federal fleet." Accordingly, DOE proposes to define the term "Federal fleet" to reconcile the applicability of the requirements of section 400AA of EPCA, E.O. 13423, E.O. 13514, and the May 2011 Presidential Memorandum.

Both E.O. 13423 and E.O. 13514 establish requirements for agency fleets, defining the term "agency" to mean "an executive agency as defined in section 105 of title 5, United States Code, excluding the Government Accountability Office." 72 FR at 3922; 74 FR at 52125. The May 2011 Presidential Memorandum also defines the term "agency" consistent with both Executive Orders. Moreover, both E.O. 13423 and E.O. 13514 apply to agencies operating fleets "of at least 20 motor vehicles." 72 FR at 3919; 74 FR at 52118. Section 400AA of EPCA establishes AFV acquisition requirements for "vehicles acquired annually for use by the Federal Government." 42 U.S.C. 6374(a)(1). The AFV acquisition requirements under section 400AA of EPCA apply both to vehicles acquired by "agencies" and to certain vehicles acquired by the U.S. Postal Service. *See* 42 U.S.C. 6374(a)(3)(B)).

Upon consideration of the requirements of section 400AA of EPCA, E.O. 13423, E.O. 13514, and the May 2011 Presidential Memorandum, DOE proposes to define the term “Federal fleet” to mean 20 or more Federally-operated motor vehicles operated within the United States. The term “Federally-operated” would include motor vehicles that are operated by an “Executive agency” as that term is defined in section 105 of title 5, United States Code; however, for consistency with the requirements of 400AA of EPCA, E.O. 13423, E.O. 13514, and the May 2011 Presidential Memorandum, the term “Federally-operated” would exclude the Government Accountability Office and would include the U.S. Postal Service. DOE further proposes that the term “Federal fleet” would include Federally-operated motor vehicles and motor vehicles operated by contractors or sub-contractors to the Federal Government. However, the term “Federal fleet” would not include those motor vehicles defined under proposed 10 CFR 438.2(j) as “exempt vehicles” and certain motor vehicles that are both contractor- or sub-contractor-owned and operating under Federal contract.

Under the proposed rule, a determination of annual petroleum and alternative fuel consumption levels would be required for all Federal fleet motor vehicles. The term “alternative fuel consumption,” as defined in proposed 10 CFR 438.2(d), also would include the alternative fuel used in exempt vehicles as well as the alternative fuel used in low-speed electric vehicles (LSEVs)² regardless of whether the LSEV is intended for use as an on-road or non-road vehicle.

² The definition of the term “low-speed electric vehicle,” as used throughout this proposed rule, is synonymous with the definition of the term “neighborhood electric vehicles” referenced in section 142 of EISA.

The inclusion in the definition of the term “alternative fuel consumption” of alternative fuel used in LSEVs and exempt vehicles is consistent with the existing approach under E.O. 13423, and DOE believes such a definition would provide a strong incentive for Federal fleets to use alternative fuel to the maximum extent possible. Similarly, including in this definition the alternative fuel used in LSEVs would encourage the replacement of petroleum with alternative fuel. Under the proposed definition of “petroleum consumption” in 10 CFR 438.2(v), though, petroleum used in exempt vehicles and LSEVs would not be included as part of a Federal fleet’s “petroleum consumption.” Once again, this approach is consistent with the extant approach under E.O. 13423.

Under proposed 10 CFR 438.1(j)(2), law enforcement motor vehicles would be exempt from the proposed requirements on Federal fleets. Proposed 10 CFR 438.1(o) defines the term “law enforcement motor vehicle” as “any motor vehicle that engages in, or is equipped to engage in, protective, high-speed, or law enforcement activities.” However, in accordance with the May 2011 Presidential Memorandum on Federal fleet performance, GSA has been directed to issue guidance on the applicability and implementation of AFV requirements on law enforcement vehicles. DOE will consider all future GSA guidance in development and preparation of the final rule.

While certain vehicles would be exempt from inclusion as part of a Federal fleet, it is important to recognize that the statutory requirements would not apply to individual vehicles. Instead, the petroleum reduction and alternative fuel use requirements are fleet-level requirements.

Under proposed 10 CFR 438.1(b), Federal motor vehicles not subject to Part 438 because they do not meet the definition of the term “Federal fleet” under proposed 10 CFR 438.2(l) nevertheless would be encouraged to comply voluntarily with the regulations.

III. Discussion

Pursuant to Table III.1 and the discussion contained in this section, each Federal fleet subject to this proposed rule would be subject to a statutorily-required reduction in petroleum consumption and increase in alternative fuel consumption.

Table III.1. Federal Fleet Petroleum Reduction and Alternative Fuel Consumption Requirements.³

Agency	Petroleum		Alternative Fuel	
	FY 2005 Petroleum Consumption Baseline (GGE) ^a	FY 2015 Petroleum Consumption Requirement (GGE)	FY 2005 Alternative Fuel Consumption Baseline (GGE)	FY 2015 Alternative Fuel Consumption Requirement (GGE)
U.S. Postal Service	144,801,193	115,840,954	1,051,106 ^b	1,156,217
Department of Defense	79,898,347	63,918,678	2,323,322 ^b	2,555,654
Department of the Interior	18,734,809	14,987,847	500,000 ^d	550,000
Department of Agriculture	18,473,766	14,779,013	500,000 ^d	550,000
Department of Veterans Affairs	8,729,032	6,983,226	438,282 ^c	482,111
Department of Energy	7,401,460	5,921,168	624,704 ^b	687,174

³ Table III.1 does not contain an exhaustive list of petroleum consumption and alternative fuel consumption requirements for all Federal fleets. Rather, Table III.1 includes those Federal fleets that comprised 99% of the Federal Government’s petroleum consumption in FY 2005.

U.S. Army Corps of Engineers	4,933,502	3,946,802	246,944 ^c	271,639
Department of Homeland Security	3,801,408	3,041,126	222,648 ^b	244,913
Department of Transportation	3,660,906	2,928,725	186,458 ^c	205,104
Department of Labor	3,318,384	2,654,707	168,628 ^c	185,491
Tennessee Valley Authority	2,929,403	2,343,522	146,474 ^c	161,121
Department of Health and Human Services	2,043,622	1,634,898	103,463 ^c	113,809
National Aeronautics and Space Administration	1,277,165	1,021,732	148,723 ^b	163,595
Department of Commerce	1,211,082	968,866	60,609 ^c	66,669
Department of Justice	599,643	479,714	113,462 ^b	124,808
General Services Administration	573,245	458,596	30,171 ^c	33,188
^a GGE is a gasoline gallon equivalent, or the volume of fuel having the same energy content as a gallon of gasoline. ^b FY 2005 alternative fuel consumption baseline established per 10 CFR 438.102(b)(1): actual FY 2005 alternative fuel consumption. ^c FY 2005 alternative fuel consumption baseline established per 10 CFR 438.102(b)(2)(a): 5% of FY 2005 total fuel consumption. ^d FY 2005 alternative fuel consumption baseline established per 10 CFR 438.102(b)(2)(b): 500,000 GGE.				

Petroleum Reduction Requirement

Consistent with section 142 of EISA, beginning in FY 2010, each Federal fleet would be required to achieve a reduction in its annual petroleum consumption by an amount necessary to meet the October 1, 2015, requirement of at least a 20 percent lower annual petroleum consumption as relative to its FY 2005 baseline level. For FYs 2010 through 2014, proposed 10 CFR 438.103(a) sets forth non-mandatory interim milestones to assess Federal fleet progress in meeting the FY 2015 annual petroleum reduction requirements. Although these interim milestones are non-mandatory, the milestones are consistent with the petroleum reduction requirements set forth in E.O. 13514.

As required under section 142 of EISA and as set forth under proposed 10 CFR 438.101(a), Federal fleets must achieve at least a 20 percent reduction in annual petroleum consumption “not later than October 1, 2015, and for each year thereafter”; i.e., by October 1, 2015, each Federal fleet must achieve at least a 20 percent reduction in its annual petroleum consumption as calculated from the applicable FY 2005 baseline. That is, by the end of FY 2015 and for each year thereafter, annual Federal fleet petroleum consumption must be equal to or less than 80 percent of the amount that Federal fleet consumed in FY 2005. This interpretation is complementary of the requirement set forth in E.O. 13514 that each Federal fleet reduce its “total consumption of petroleum products by a minimum of 2 percent annually through the end of [FY] 2020, relative to a baseline of [FY] 2005.” Accordingly, compliance with E.O. 13514 would result in full compliance with the petroleum reduction requirements set forth in EISA.

Alternative Fuel Use Requirement

As required under section 142 of EISA, beginning in FY 2010, each Federal fleet would be required to achieve an increase in its annual alternative fuel consumption by an amount necessary to meet the October 1, 2015, requirement established by Congress in EISA of at least a 10 percent increase in annual alternative fuel consumption relative to FY 2005 baseline levels. For FYs 2010 through 2014, proposed 10 CFR 438.103(b) sets forth non-mandatory interim milestones to assess Federal fleet progress in meeting the FY 2015 annual alternative fuel consumption requirements.

As noted above, the language set forth in E.O. 13423 and E.O. 13514 regarding requirements for Federal fleet petroleum consumption reductions and alternative fuel consumption increases is not identical to the language contained in EISA section 142. EISA provides that each Federal fleet shall achieve at least “a 10 percent increase in annual alternative fuel consumption” whereas E.O. 13423 provides that each fleet must increase “the total fuel consumption that is non-petroleum-based by 10 percent annually.” The CEQ Instructions provides that the requirement in E.O. 13423 that fleets increase alternative fuel usage “by 10 percent annually” is “measured relative to the prior year’s alternative fuel usage levels.” As required under section 142 of EISA and as set forth in proposed 10 CFR 438.101(b), however, each Federal fleet by October 1, 2015, would be required to achieve at least a 10 percent increase in its annual alternative fuel consumption as calculated from the applicable FY 2005 baseline. Therefore, by the end of FY 2015 and for each year thereafter, annual Federal fleet alternative fuel consumption would be required to be equal to or greater than 110 percent of the amount that Federal fleet consumed in FY 2005. Accordingly, consistent with the approach for calculating reductions in annual petroleum consumption under proposed 10 CFR 438.101(a), increases in annual Federal fleet alternative fuel consumption under proposed 10 CFR 438.101(b) would be calculated as measured relative to its FY 2005 baseline.

For purposes of the proposed rule, DOE believes that requiring increases in annual alternative fuel consumption levels potentially would lead to required levels of alternative fuel consumption that far exceed the current total of fuel use without regard to actual demand levels. Therefore, DOE proposes that “not later than October 1, 2015, and for each year thereafter,” each Federal fleet would be required to ensure that its annual

alternative fuel consumption is at least 10 percent greater than its FY 2005 alternative fuel consumption level. DOE notes that the EISA section 142 alternative fuel consumption requirement and the proposed non-mandatory interim milestones are not as stringent as the annual alternative fuel usage requirements set forth in E.O. 13423; however, compliance with E.O. 13423 would result in full compliance with the alternative fuel requirements set forth in EISA.

Milestones and Annual Reporting

EISA section 142 requires that DOE establish interim numeric milestones to assess annual progress towards accomplishing Federal fleet requirements for petroleum reduction and alternative fuel use. EISA further requires the submission of annual Federal fleet reports in order to measure progress towards meeting each of the milestones and the FY 2015 requirements.

Under proposed 10 CFR 438.101, not later than October 1, 2015, the annual petroleum consumption for each Federal fleet must be equal to or less than 80 percent of the Federal fleet's FY 2005 baseline level, and the annual alternative fuel consumption for each Federal fleet must be equal to or greater than 110 percent of the Federal fleet's FY 2005 baseline level. As explained above, proposed 10 CFR 438.103(a) and (b) set forth non-mandatory interim milestones for each Federal fleet to reduce its annual petroleum consumption and to increase its annual alternative fuel consumption between FYs 2010 and 2014.

Progress towards meeting these interim milestones would be required to be reported annually pursuant to proposed 10 CFR 438.104. Under this section, DOE would require submission of annual reports to DOE containing information on the petroleum and alternative fuel used in Federal fleet motor vehicles. This report also would include the alternative fuel used in exempt vehicles and LSEVs. All reports under this section would be required to be submitted through the Federal Automotive Statistical Tool Web-based reporting system (FAST) (<https://fastweb.inel.gov/>) no later than December 15 of each calendar year.

Written Plan

Consistent with section 142 of EISA, proposed 10 CFR 438.201 requires the development and submission of a written plan, including implementation dates, to meet the required Federal fleet petroleum reduction and alternative fuel increase levels under the proposed rule. This written plan would contain similar information as the fleet management plan that agencies are directed to submit to GSA under the May 2011 Presidential Memorandum. Accordingly, DOE has attempted to identify areas in which compliance with the proposed requirements under 10 CFR 438.201 also would be useful in satisfying the requirements of the Presidential Memorandum. Under proposed 10 CFR 438.201, the written plan would be required to:

1. *Identify the specific measures the Federal fleet would use to meet the petroleum reduction and alternative fuel consumption requirements and interim milestones set forth in proposed 10 CFR 438.101 and 438.103.* The plan would include some or all of the following petroleum reduction measures: the Federal fleet's use

of alternative fuels; the acquisition of dual fueled vehicles; the acquisition of vehicles with higher fuel economy, including but not limited to hybrid electric vehicles, LSEVs, electric vehicles, and plug-in hybrid electric vehicles if such vehicles are commercially available; the substitution of light trucks with cars; an increase in vehicle load factors; a decrease in vehicle miles traveled; a decrease in fleet size; and other measures.

2. *Quantify the reductions in petroleum consumption and increases in alternative fuel consumption projected to be achieved by each measure for each FY.* For each specific measure identified above, the plan would be required to contain estimates, for each FY, of the reduction in petroleum consumption or increase in alternative fuel consumption in both gasoline gallon equivalents (GGEs) and percentage increases or decreases from the Federal fleet's FY 2005 baseline level.
3. *Specify the date by which each measure in the plan will be implemented.* For each measure identified above, the plan would be required to contain the estimated date when the measure would be fully implemented.
4. *Projecting the size and composition of the fleet by vehicle class and fuel type that corresponds with mission requirements.* Similar to the direction under the Presidential Memorandum for agencies to determine their optimal fleet inventory, the plan would be required to contain an evaluation of minimum vehicle requirements needed to support mission needs at each fleet location and identify opportunities to eliminate vehicles that exceed requirements. In order to meet this requirement, Federal fleets could develop a vehicle acquisition and management plan to: (1) acquire AFVs where alternative fuel is available; (2) increase overall Federal fleet fuel economy through the acquisition of smaller-sized vehicles

and/or hybrid, electric, or other advanced technology vehicles; and (3) ensure that the most fuel efficient vehicle is used for the required task. Federal fleets would be encouraged to use the GSA Vehicle Allocation Methodology for determining optimum fleet inventory in developing the written plan under proposed 10 CFR 438.201.

5. *Specify actions to ensure that AFVs are acquired and located where the appropriate alternative fuel is available.* The plan would identify the specific actions Federal fleets would implement to ensure that AFVs are acquired and located where alternative fuel is available, including the identification of areas for future improvement of infrastructure to support AFVs in the Federal fleet.
6. *Projecting the use of alternative fuel by AFVs and LSEVs in each FY.* The plan would be required to contain projections on the use of alternative fuel and existing fuel infrastructure by AFVs and LSEVs and plans for the installation of new alternative fuel infrastructure to support those alternative fuel use projections. The plan also would be required to address actions to reduce or eliminate the deployment of AFVs in locations where the appropriate alternative fuel is not available.

Each written plan would require senior management approval, clearly assign responsibility for implementation, put forth assumptions made in developing projections, and address resource requirements necessary for success.

Petroleum and Alternative Fuel Consumption FY 2005 Baseline Values

EISA section 142 directs the Secretary to establish FY 2005 Federal fleet petroleum consumption and alternative fuel consumption baseline values. As discussed above, beginning on October 1, 2015, the annual petroleum consumption for each Federal fleet would be equal to or less than 80 percent of that Federal fleet's FY 2005 baseline level, and the annual alternative fuel consumption for each Federal fleet would be equal to or greater than 110 percent of that Federal fleet's FY 2005 baseline level. In the event that a Federal fleet was not in existence in FY 2005, DOE would take steps to establish reasonable baselines and would prorate the requirements based on the date that the Federal fleet was established.

DOE initially has determined under the proposed rule that the petroleum consumption and alternative fuel consumption baseline values should be those reported for Federal fleets through FAST for FY 2005. DOE would encourage that this information be reviewed and, if it is found that any value is incorrect, contact DOE to request a correction. For example, a correction might be requested in the event that the Federal fleet's alternative fuel use value for FY 2005 submitted through FAST did not include the electricity used in the Federal fleet's LSEVs.

Federal fleets with extremely low alternative fuel use would be subject to a proposed minimum alternative fuel baseline. The minimum baseline would be the greater of (1) the amount of alternative fuel consumed by that Federal fleet in FY 2005, expressed in GGEs, as reflected in FY 2005 FAST data, or (2) the lesser of (a) five percent of total Federal fleet vehicle fuel (petroleum and alternative fuel) consumption and (b) 500,000 GGEs. For example, if a Federal fleet reported using 1,400,000 gallons of petroleum and

600,000 GGEs of alternative fuel in its FY 2005 FAST data, that Federal fleet's FY 2005 alternative fuel baseline level would be 600,000 GGEs, as 600,000 GGEs is the greater of (1) the amount of alternative fuel consumed by that Federal fleet in 2005 (600,000 GGEs) and (2) five percent of total vehicle consumption in FY 2005 (100,000 gallons, which is less than 500,000 GGEs). However, if a Federal fleet reported using 1,950,000 gallons of petroleum and 50,000 GGEs of alternative fuel in its FY 2005 FAST data, that Federal fleet's FY 2005 baseline level would be 100,000 GGEs, as 100,000 GGEs is the greater of (1) the amount of alternative fuel consumed by that Federal fleet in 2005 (50,000 GGEs) and (2) five percent of total vehicle consumption in FY 2005 (100,000 gallons, which is less than 500,000 GGEs).

Using only actual FY 2005 levels as the baseline would require limited (in volume) increases in alternative fuel for Federal fleets with low FY 2005 alternative fuel usage and large (in volume) increases in alternative fuel for Federal fleets with high FY 2005 alternative fuel usage, thereby requiring less alternative fuel use by those Federal fleets with historically low alternative fuel usage. This approach is being taken to encourage those Federal fleets that have not been aggressive in substituting alternative fuel for petroleum to begin doing so and to bring these Federal fleets up to levels similar to other Federal fleets.

IV. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form,

indicated in the **ADDRESSES** section of this notice of proposed rulemaking. To help DOE review the comments, interested persons are asked to refer to specific proposed rule provisions, if possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information Act regulations at 10 CFR 1004.11.

V. Regulatory Review

A. Executive Order 12866

Today's proposed rule has been determined to be a "significant regulatory action" under section 3(f) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. National Environmental Policy Act

DOE has determined that this proposed rule is covered by the categorical exclusion (CX) found in DOE's National Environmental Policy Act (NEPA) regulations at paragraph A7 of Appendix A to Subpart D, 10 CFR Part 1021. The categorical exclusion in paragraph A7 (CX A7) encompasses the "transfer, lease, disposition or acquisition of interests in personal property (e.g., equipment and materials) . . . if property use is to remain unchanged; i.e., the type and magnitude of impacts would remain essentially the same." DOE's proposed action in this rulemaking is limited to reflecting statutory standards and deadlines, establishing voluntary milestones, and collecting reports. These actions have almost no impact on the human environment. However, to the extent that DOE might be deemed to have some role in the agencies' proposals to change the composition of their federal fleets, DOE's proposed action would comprise the transfer, lease, disposition or acquisition of personal property (i.e., vehicles and related infrastructure) without changing vehicle use to an extent that results in significant impacts to the environment.

DOE has experience with determining that CX A7 encompasses changes to the composition of fleets that are not under DOE's control. For example, DOE determined that a grant to the Texas Railroad Commission for the installation of propane refueling infrastructure and vehicle purchases was categorically excluded from further NEPA review under CX A7. *See <http://cxnepa.energy.gov/docs/002488.PDF>*. DOE made more than twenty additional CX determinations under CX A7 for Clean Cities grants to State and local governments for reducing petroleum consumption associated with their fleets. This past practice supports DOE's determination that the proposed rule is categorically excluded under CX A7.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA, 5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel’s website:
<http://www.gc.doe.gov>.

DOE has reviewed today’s proposed rule under the provisions of the RFA and the procedures and policies published on February 19, 2003. The proposed rule would apply only to Federal agencies, which are not small entities under the RFA. For this reason, DOE certifies that this proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared an initial regulatory flexibility analysis for this rulemaking. DOE’s certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

This rulemaking does not include any information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

E. Unfunded Mandates Reform Act of 1995

DOE reviewed this regulatory action under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104-4), which requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement assessing the resulting costs, benefits and other effects of the rule on the national economy (2 U.S.C. 1532(a) and (b)). Section 204 of UMRA requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local and Tribal governments on a proposed “significant intergovernmental mandate” (2 U.S.C. 1534). Section 203 of UMRA requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments that may be affected before establishing any requirements that might significantly or uniquely affect small governments (2 U.S.C. 1533). On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at: <http://www.gc.doe.gov>).

Today's proposed rule, which would apply only to Federal fleets, contains neither an intergovernmental mandate nor a mandate that may result in the expenditure by State, local or Tribal governments in the aggregate, or by the private sector, of \$100 million or more in any year. Accordingly, no assessment or analysis is required under UMRA.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and initially has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of

power and responsibilities among the various levels of government. Therefore, no further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of the applicable standards in sections 3(a) and 3(b) to determine either that those standards are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use

should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

As discussed in Part V.A above, this proposed rule has been determined to be a “significant regulatory action” under Executive Order 12866. Today’s action, however, is not likely to have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Nor has this action been designated by OIRA as a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

List of Subjects in 10 CFR Part 438

Energy, Energy conservation, Fuel, Motor vehicles, Petroleum, and Recordkeeping and reporting requirements.

Issued in Washington, DC, on January 20, 2012.

Henry Kelly
Acting Assistant Secretary,
Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, the Department of Energy is proposing to amend title 10 of the Code of Federal Regulations by adding a new Part 438 as set forth below:

**PART 438—PETROLEUM REDUCTION AND ALTERNATIVE FUEL USE
REQUIREMENTS FOR FEDERAL FLEETS**

Subpart A – General Provisions

Sec.

438.1 Purpose and scope.

438.2 Definitions.

Subpart B – Petroleum Reduction and Alternative Fuel Consumption Requirements

Sec.

438.100 Purpose and scope.

438.101 Consumption requirements.

438.102 FY 2005 baseline.

438.103 Interim milestones.

438.104 Annual reporting.

Subpart C – Plans

Sec.

438.200 Purpose and scope.

438.201 Written plan.

438.202 Requisite elements.

438.203 Revision.

Authority: 42 U.S.C. 6374e; 42 U.S.C. 7101 *et seq.*

Subpart A – General Provisions

§ 438.1 Purpose and scope.

(a) The provisions of this part implement section 142 of the Energy Independence and Security Act of 2007 (Pub. L. 110-140).

(b) This part applies to each Federal fleet, as that term is defined in section 438.2(l). Federal motor vehicles not subject to this part because they do not meet the definition of the term “Federal fleet” under 438.2(l) are encouraged to comply voluntarily with the requirements of this part.

§ 438.2 Definitions.

The following definitions apply to this part:

(a) “*Acquire*” means to take into possession or control.

(b) “*Act*” means the Energy Independence and Security Act of 2007 (Pub. L. 110-140).

(c) “*Alternative fuel*” means the same as the definition of “alternative fuel” set forth at section 490.2 of this chapter.

(d) “*Alternative fuel consumption*” means alternative fuel consumed in all motor vehicles, including light duty, medium duty, and heavy duty motor vehicles, in a Federal fleet. The term also includes alternative fuel consumed in exempt vehicles and the alternative fuel consumed in low-speed electric vehicles.

(e) “*Alternative fueled vehicle*” means a dedicated vehicle or a dual fueled vehicle, and includes a “new qualified fuel cell motor vehicle” as defined in 26 U.S.C. 30B(b)(3), a “new advanced lean burn technology motor vehicle” as defined in 26 U.S.C. 30B(c)(3), a “new qualified hybrid motor vehicle” as defined in 26 U.S.C. 30B(d)(3), and any other type of vehicle that the Administrator of the Environmental Protection Agency demonstrates to the Secretary would achieve a significant reduction in petroleum consumption.

(f) “*Dedicated vehicle*” means –

(1) a motor vehicle that operates solely on alternative fuel; or

(2) a low-speed electric vehicle

(g) “*DOE*” means the U.S. Department of Energy.

(h) “*Dual fueled vehicle*” means a motor vehicle that meets the criteria for a dual fueled automobile as that term is defined in section 513(h)(1)(C) of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. 32901(a)(9);

(i) “*Emergency motor vehicle*” means any motor vehicle that is used in an emergency capacity at least 75 percent of the time.

(j) “*Exempt vehicle*” means –

(1) a motor vehicle used for motor vehicle manufacturer product evaluations or tests;

(2) a law enforcement motor vehicle;

(3) an emergency motor vehicle;

(4) a military tactical vehicle;

(5) a motor vehicle owned and operated by the Central Intelligence Agency;

(6) a motor vehicle that is not licensed for use on roads and highways; or

(7) a Federally-owned motor vehicle that is operated solely by an Indian nation or a State-run Fish and Wildlife service.

(k) “*FAST*” means the Federal Automotive Statistical Tool developed by DOE.

(l) “*Federal fleet*” means 20 or more Federally-operated motor vehicles operated within the United States or motor vehicles operated within the United States by any contractor or sub-contractor to the Federal Government, except that the term does not include –

- (1) exempt vehicles as defined in section 438.2(j);
- (2) motor vehicles owned by a contractor or sub-contractor that qualifies as a small business under 13 C.F.R. Part 121;
- (3) motor vehicles owned by a contractor or sub-contractor when the relevant contract, including options and renewals, is for a period of less than 12 months; and
- (4) motor vehicles owned by a contractor or sub-contractor when a central purpose of the relevant contract is neither the provision of motor vehicles nor the provision of transportation services for people or materials on site.

(m) “*Federally-operated*” means operated by an executive agency as defined in section 105 of title 5, United States Code, excluding the Government Accountability Office, and including the U.S. Postal Service.

(n) “*Fiscal year*” means, for a given year, the 12-month period running from October 1 of the prior calendar year through September 30 of the given calendar year. For example, Fiscal Year (FY) 2010 means October 1, 2009, through September 30, 2010.

(o) “*Heavy duty motor vehicle*” means a motor vehicle with a gross vehicle weight rating of at least 16,000 pounds before any after-market conversion to alternative fuel operation.

(p) “*Law enforcement motor vehicle*” means any motor vehicle that engages in, or is equipped to engage in, protective, high-speed, or law enforcement activities.

(q) “*Light duty motor vehicle*” means a light duty truck or light duty vehicle, as such terms are defined under section 216(7) of the Clean Air Act (42 U.S.C. 7550(7)), having a gross vehicle weight rating of 8,500 pounds or less before any after-market conversion to alternative fuel operation.

(r) “*Low-speed electric vehicle*” means a 4-wheeled on-road or non-road vehicle that

(1) has a top attainable speed in 1 mile of more than 20 mph and not more than 25 mph on a paved level surface; and

(2) is propelled by an electric motor and an on-board, rechargeable energy storage system that is rechargeable using an off-board source of electricity

(s) “*Medium duty motor vehicle*” means a motor vehicle with a gross vehicle weight rating of greater than 8,500 pounds but less than 16,000 pounds before any after-market conversion to alternative fuel operation.

(t) “*Military tactical vehicle*” means a motor vehicle designed or modified to military specification and used for the purpose of providing direct transportation support

of combat or tactical operations or the protection of nuclear weapons, and which is not used for any other purpose.

(u) “*Motor vehicle*” means a self-propelled vehicle designed for transporting persons or property on a street or highway. The term includes light duty, medium duty, and heavy duty motor vehicles.

(v) “*Petroleum consumption*” means petroleum consumed in all Federal fleet motor vehicles, including light duty, medium duty, and heavy duty motor vehicles. The term excludes both petroleum consumed in exempt vehicles and petroleum consumed in low-speed electric vehicles.

(w) “*Secretary*” means the Secretary of Energy.

Subpart B – Petroleum Reduction and Alternative Fuel Consumption Requirements

§ 438.100 Purpose and scope.

This subpart sets forth requirements and interim milestones for reductions in Federal fleet petroleum consumption and increases in Federal fleet alternative fuel consumption.

§ 438.101 Consumption requirements.

Not later than October 1, 2015, and for each year thereafter:

(a) The annual petroleum consumption of each Federal fleet must be equal to or less than 80 percent of that Federal fleet's FY 2005 baseline level, as determined in accordance with section 438.102(a); and

(b) The annual alternative fuel consumption of each Federal fleet plus the annual alternative fuel consumption by each low-speed electric vehicle and exempt vehicle must be equal to or greater than 110 percent of the Federal fleet's FY 2005 baseline level, as determined in accordance with section 438.102(b).

In the event that a Federal fleet was not in existence in FY 2005, DOE will prorate the requirements set forth in this section based on the date that the Federal fleet was established.

§ 438.102 FY 2005 baseline.

The applicable FY 2005 baseline under section 438.101 for each Federal fleet is:

(a) With respect to annual petroleum consumption, the amount of petroleum consumed by that Federal fleet in FY 2005 expressed in gasoline gallon equivalents, as reflected in the FAST data submitted to DOE for that Federal fleet for FY 2005; and

(b) With respect to annual alternative fuel consumption, the greater of:

(1) The amount of alternative fuel consumed by that Federal fleet in FY 2005 expressed in gasoline gallon equivalents, as reflected in the FAST data submitted to DOE for that Federal fleet for FY 2005, or

(2) The lesser of:

- a. Five percent of the Federal fleet's total vehicle fuel (petroleum plus alternative fuel) consumption in FY 2005, and
- b. 500,000 gasoline gallon equivalents.

In the event that a Federal fleet was not in existence in FY 2005, DOE will establish reasonable baselines for that Federal fleet.

§ 438.103 Interim milestones.

The following non-mandatory interim milestones are to be used by each Federal fleet to assess its annual progress towards meeting the consumption requirements in section 438.101, as calculated from the applicable FY 2005 baseline:

(a) Petroleum consumption

- (1) by September 30, 2010 -- 10 percent reduction;
- (2) by September 30, 2011 – 12 percent reduction;
- (3) by September 30, 2012 – 14 percent reduction;
- (4) by September 30, 2013 – 16 percent reduction; and
- (5) by September 30, 2014 – 18 percent reduction.

(b) Alternative fuel consumption

- (1) by September 30, 2010 -- 5 percent increase;
- (2) by September 30, 2011 – 6 percent increase;
- (3) by September 30, 2012 – 7 percent increase;
- (4) by September 30, 2013 – 8 percent increase; and
- (5) by September 30, 2014 – 9 percent increase.

§ 438.104 Annual reporting.

Beginning in FY 2010, the status of each Federal fleet must be reported annually in order to measure Federal fleet progress towards meeting the interim milestones set forth in section 438.103 and the consumption requirements set forth in section 438.101. Reports under this section must be submitted to DOE through the FAST system no later than December 15 of each calendar year. Each report must include the petroleum and alternative fuel used in all Federal fleet motor vehicles. Each report also must include the alternative fuel used in exempt vehicles and the alternative fuel used in low-speed electric vehicles.

Subpart C – Plans

§ 438.200 Purpose and scope.

This subpart sets forth provisions concerning Federal fleet plans for meeting the petroleum consumption reductions and alternative fuel consumption increases set forth in subpart B.

§ 438.201 Written plan.

No later than December 31, 2012, a written plan must be submitted to DOE that specifies each Federal fleet's strategy for meeting the consumption requirements set forth in

section 438.101, including the interim milestones provided in section 438.103. Plans must be sent to the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Federal Energy Management Program (EE-2L), 1000 Independence Avenue, S.W., Washington, D.C. 20585, or such other address as DOE may provide by notice in the *Federal Register*.

§ 438.202 Requisite elements.

The written plan must:

- (a) identify the specific measures that the Federal fleet will rely upon to meet the consumption requirements and interim milestones, such as plans for right-sizing the Federal fleet and strategies for reducing vehicle miles traveled;
- (b) quantify (in percentage and in gasoline gallon equivalents), for each measure set forth in the plan, the reduction in petroleum consumption, and the increase in alternative fuel consumption projected to be achieved by the measure in each FY;
- (c) specify the date by which each measure set forth in the plan will be implemented;
- (d) quantify the composition of the Federal fleet by vehicle class and fuel type, ensuring that it is correctly sized to support mission requirements in each FY;
- (e) specify actions to ensure that alternative fueled vehicles are acquired and located where the appropriate alternative fuel is available; and
- (f) quantify (in percentage) the use of alternative fuel by alternative fueled vehicles and low-speed electric vehicles in each FY.

§ 438.203 Revision.

Whenever an annual report under section 438.104 indicates that the Federal fleet failed to meet an interim milestone under section 438.103, the plan previously developed and submitted under this subpart must be revised and resubmitted to the DOE Federal Energy Management Program within 180 days of submission of the annual report.

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